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Supreme Court, U.S.
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No. 95-176

In The

Supreme Court of the United States

October Term, 1995

JOHN MAYER AND DEBORAH MAYER,

Petitioners,

v.

SPANEL INTERNATIONAL, LTD., and BANK ONE, ROCKFORD, N.A.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether reasonable reliance is an element of a creditor's prima facie case to prove nondischargeability of a debt under Section 523(a)(2)(A) of the Bankruptcy Code.

2. Whether attorneys' fees provided for in the contract between a debtor and creditor should be treated as part of the nondischargeable debt when the underlying debt is declared to be nondischargeable pursuant to Section 523(a)(2)(A) of the Bankruptcy Code.

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STATEMENT OF THE CASE

Respondent Bank One, Rockford, N.A. (Bank One), formerly the First National Bank of Rockford, obtained a judgment against petitioners John and Deborah Mayer in a foreclosure suit decided in the 17th Judicial Circuit Court, Winnebago County, Illinois. Petitioners subsequently filed for bankruptcy. Bank One filed an adversary complaint against petitioners to prevent the discharge in bankruptcy of the deficiency judgment obtained in state court.

Petitioners' debt to Bank One arose out of a real estate transaction which occurred in the autumn of 1986. Petitioners obtained a mortgage loan from Bank One for the purchase of the Bess Hotel. John Mayer personally contacted Bank One to apply for the real estate mortgage and in connection with such application, provided Bank One with financial statements and tax returns. He further assured Bank One that he would subsidize hotel operations with his personal income until it became profitable.

Bank One's loan commitment, which was mailed to petitioners, specified that the title to the property being purchased could not be placed in trust and that the mortgage and note had to be personally signed by petitioners. The mortgage and promissory note were then executed by petitioners before a notary public.[1]

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[1] Although petitioners subsequently denied the execution of these documents, this issue was fully litigated in the foreclosure action and decided against them. Pursuant to an order entered in bankruptcy court, petitioners are collaterally estopped from denying the execution of those documents.

John Mayer had other contact with Bank One's loan officer during the pendency of the sale to discuss closing points. In a conversation that took place well in advance of the closing, the loan officer made it plain to John Mayer that she was dealing only with petitioners.

Petitioners sought and obtained the mortgage loan without ever intending to repay. Petitioners never disclosed that their cousins and business associates, Donald and Rosemarie Monti, were to be the true parties in interest and that petitioners were merely "fronting" for the Montis.[2]

Consistent with their intention to never repay the loan, petitioners failed in their obligations under the mortgage. Bank One's collection efforts were unsuccessful and the foreclosure suit was initiated. Judgment was entered in state court after two and one-half years of litigation.

The dispute proceeded to bankruptcy court where judgment was entered for Bank One, but the Bank's request for attorneys' fees, as provided for in the contract freely entered into by petitioners, was denied. Upon reconsideration, however, the court awarded fees because

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[2] Petitioners elaborate upon the power of attorney which revealed the true nature of the real estate transaction between the Montis and the Mayers and a purported conflict in the testimony of Bank One's loan officer regarding her knowledge of same. Petitioners fail to indicate, however, that the bankruptcy judge credited the loan officer's testimony at trial that she had no knowledge of the power of attorney at the time the loan was made. The district court and the Seventh Circuit both held that this finding was not clearly erroneous.

they were part of the debt petitioners agreed to repay pursuant to the terms of their promissory note and mortgage. The district court affirmed the bankruptcy court ruling and the Seventh Circuit in turn affirmed the judgment of the district court.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE COURT BELOW HELD THAT RESPONDENTS REASONABLY RELIED ON PETITIONERS' FRAUDULENT MISREPRESENTATIONS. CONSEQUENTLY, THE GRANT OF A WRIT OF CERTIORARI WILL NOT AFFECT THE JUDGMENT.

The principal issue presented by the petition for certiorari is whether reasonable reliance on a debtor's fraudulent misrepresentation is an element of a creditor's prima facie case when establishing nondischargeability of a debt under 11 U.S.C. Section 523(a)(2)(A) of the Bankruptcy Code. The Seventh Circuit answered that question in the negative. The appellate court's well reasoned judgment is supported by the plain language of Section 523(a)(2)(A), as well as the statute's legislative history.

Even if this Court concludes that a creditor must demonstrate reasonable reliance before a debt can be deemed nondischargeable, however, issuance of a writ of certiorari is inappropriate because the Seventh Circuit determined that the respondents in these consolidated cases reasonably relied on petitioners' fraudulent misrepresentations. *See In re Mayer,* 51 F.3d 670, 676 (7th Cir. 1995) (" . . . the reliance element of §523(a)(2)(A) offers the Mayers no comfort"). The court held that reliance is

comprised of materiality and causation and does not include an element of investigation. *Id.* at 675, 676. Understood in this fashion, the Seventh Circuit determined that the respondents reasonably relied upon the petitioners' misrepresentations.

Thus, regardless of whether reasonable reliance is necessary, respondents prevail in this lawsuit. Consequently, a decision from this Court on the issue of reasonable reliance will not affect the judgment in this case. The first question presented by the petition, therefore, is not a proper candidate for issuance of a writ of certiorari.

II. *FIELD V. MANS* ALREADY PRESENTS THE QUESTION OF WHETHER SECTION 523(a)(2)(A) OF THE BANKRUPTCY CODE CONTAINS A REASONABLE RELIANCE REQUIREMENT. THE DECISION TO GRANT A PETITION FOR A WRIT OF CERTIORARI IN THIS ACTION, THEREFORE, SHOULD BE DEFERRED PENDING THE OUTCOME IN *FIELD V. MANS*.

A writ of certiorari has been issued in *Field v. Mans*, Case No. 94-967, which presents the same issue as the first question presented herein. In *Field v. Mans*, the First Circuit concluded, contrary to decisions rendered by the Fifth and Eighth Circuits, *see In re Allison*, 960 F.2d 481, 484-85 (5th Cir. 1992), and *In re Ophaug*, 827 F.2d 340, 343 (8th Cir. 1987), that reasonable reliance is necessary. The Seventh Circuit's decision, therefore, expands, rather than creates, a conflict between circuits.

As noted above, the Seventh Circuit found that respondents exercised reasonable reliance. As a result, a

writ of certiorari should not issue in this case regardless of whether reasonable reliance is required under §523(a)(2)(A). If this Court decides for some reason, however, that denial of the petition for a writ of certiorari, as it applies to the issue of reasonable reliance, would be premature, it nevertheless should defer consideration of the petition until resolution of *Field v. Mans*. *See, e.g., Keney v. New York*, 388 U.S. 440 (1967). *Field v. Mans* has been fully briefed and is scheduled for oral argument in October. Moreover, each side to that controversy enjoys support from *amicus curiae*, including the United States on behalf of the petitioners. Under the circumstances, there is little, if anything, the parties in this action can add to the debate. Consequently, if certiorari is not denied outright, this case should be held in abeyance pending the outcome of *Field v. Mans* and not receive plenary review.

III. THE SECOND QUESTION PRESENTED IN THIS ACTION IS NOT THE SUBJECT OF A CONFLICT BETWEEN CIRCUITS, NOR IS IT SUFFICIENTLY SIGNIFICANT IN THE ABSENCE OF SUCH A CONFLICT TO JUSTIFY THE ISSUANCE OF A WRIT OF CERTIORARI.

Unlike *Field v. Mans*, the petition in this case presents an additional question, which revolves around the award of attorneys' fees. In addition to holding that reasonable reliance is not an element of a creditor's case when nondischargeability of a debt is asserted under §523(a)(2)(A), the court below ruled that:

> attorneys' fees provided by contract are part of the debt, and if the principal and (pre-bankruptcy) interest on the debt are non-dischargeable, so are the other elements of the debt. Attorneys' fees, no less than the principal and interest, are the result of the fraud, and the perpetrator cannot escape the consequences. . . . [I]f a debtor agrees by contract to pay legal expenses, this is no different in principle from agreeing to a higher rate of interest, or a balloon payment, or any other contractual element of compensation to the lender.

In re Mayer, 51 F.3d at 677 (citations omitted).

The Seventh Circuit's reasoning is correct. But even if it were not, petitioners have not identified a single case in conflict with this portion of the Seventh Circuit's decision. Standing alone and without the benefit of a conflict between courts to sustain it, petitioners' second question is not of sufficient importance to justify the exercise of this Court's jurisdiction. This Court, therefore, should deny the petition for a writ of certiorari as it relates to the issue of attorneys' fees.

IV. IF THE COURT GRANTS THE PETITION FOR A WRIT OF CERTIORARI, IT SHOULD, AFTER DECIDING *FIELD V. MANS*, SUMMARILY AFFIRM THE JUDGMENT OF THE COURT BELOW, OR IN THE ALTERNATIVE, REMAND THIS ACTION TO THE SEVENTH CIRCUIT WITH INSTRUCTIONS TO PROCEED IN ACCORDANCE WITH THIS COURT'S HOLDING IN *FIELD V. MANS*.

The decision of the First Circuit in *Field v. Mans* is wrong because it imposes a burden on creditors that is nowhere to be found in the plain language of 11 U.S.C. §523(a)(2)(A). Although "reasonable reliance" is an express element of a creditor's case pursuant to 11 U.S.C. §523(a)(2)(B), the concept of reasonable reliance is conspicuously absent from the express terms of §523(a)(2)(A). The First Circuit should not be permitted to impose terms and conditions upon creditors that Congress, despite the opportunity, and with full knowledge as to the consequences, chose not to incorporate in §523(a)(2)(A).

Thus, if this Court grants, either now or later, the petition for a writ of certiorari as it relates to the issue of reasonable reliance, it should, after reversing the judgment of the First Circuit in *Field v. Mans*, summarily affirm or remand to the Seventh Circuit with instructions to enter final judgment for respondents. Alternatively, if the petition for a writ of certiorari is granted, now or on a deferred basis, and the First Circuit's decision is affirmed, this case should be remanded to the Seventh Circuit for further proceedings consistent with this Court's ruling in *Field v. Mans*.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied, or in the alternative, consideration of the petition should be deferred until this Court decides *Field v. Mans*, at which time the judgment in this action should be summarily affirmed or remanded to the Seventh Circuit with instructions to proceed consistent with the decision in *Field v. Mans*.

Respectfully submitted,

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August, 1995